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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. [redacted]

OLIVER T. FEIN,

Petitioner,

—v.—

SELECTIVE SERVICE SYSTEM LOCAL BOARD No. 7, Yonkers, New York, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

Interest of Amicus*

For half a century the American Civil Liberties Union has defended the fundamental protections set out in the Bill of Rights. In particular, it has represented those who have asserted the rights of conscience and religious liberty protected by the First Amendment and the right to due process of law as guaranteed by the Fifth Amendment, against governmental infringement. The ACLU is now heavily engaged in the representation of young men charged with

* Written consents by the attorneys for both parties have been filed with the Clerk.

alleged violations of the draft laws, or who are seeking redress from illegal actions of the selective service system through affirmative litigation. This case is closely related to a number of prior civil actions litigated by the ACLU: *Oestereich* v. *Selective Service,* 393 U.S. 233 (1968); *Breen* v. *Selective Service,* 396 U.S. 460 (1970); *Wolff* v. *Selective Service,* 372 F.2d 817 (2nd Cir. 1967). Amicus believes that the decision of the court below is in conflict with these cases and if affirmed would undermine much of the law announced by those cases.

One Federal Court has recently stated that "Those entrusted with the awful power of conscripting the nation's young men into the armed forces in time of war or other military venture owe a duty of the most searching examination of the facts, scrupulous fairness, sensitive care, compassionate hearing, patient consideration, cautious action and deliberate and rational decision within the law. We afford no less to the worst criminal in our society." *Walsh* v. *Local Board No. 10,* 305 F. Supp. 1274, 1279 (S.D.N.Y. 1969).

We file this brief in order to present to the Court our arguments of law which support those principles.

Questions Presented

1. Whether the Court below erred in holding that Sec. 10(b)(3) of the Military Selective Service Act of 1967 barred the instant action?
2. Whether the Selective Service System's appellate administrative scheme, as utilized in this case, violates the due process clause of the Fifth Amendment?
3. Whether petitioner failed to sustain the jurisdictional prerequisite of 28 U.S.C. §1331?

Statement of the Case

After enjoying classification as a student (II-S) and later deferment in class II-A as an intern in pediatric medicine, petitioner, while still classified II-A, filed with his local board in September of 1967 an application for classification as a conscientious objector, I-O. The claim fell *prima facie* within the standards set down by this Court in *United States* v. *Seeger*, 380 U.S. 163 (1965), and *Welsh* v. *United States*, 398 U.S. 333 (1970).[1] On November 15, 1967, petitioner was retained in class II-A, the lowest classification for which he was eligible. See 32 C.F.R. §1623.2. Subsequently, at the expiration of petitioner's eligibility for a II-A classification, the local board did classify him I-O in May, 1968.

On June 4, 1968 petitioner received letters from both his local board and the State Director advising him that the latter intended to appeal the Local Board's determination that he was a conscientious objector. Immediately upon notification petitioner wrote both to the Local Board and to the Appeal Board, requesting:

> (a) a statement of reasons for the State Director's appeal,
>
> (b) notification of the standards to be applied on appeal,
>
> (c) advice as to whether any additional information other than that contained in his selective service file was to be presented to the Appeal Board,

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[1] Petitioner had also submitted letters from persons who knew him attesting to his sincerity.

(d) an opportunity to rebut any statement of reasons or findings by the State Director as to the propriety of his conscientious objector classification.

Although he requested this information on at least two occasions petitioner never received a meaningful response. Rather, on June 20, 1968, the State Appeal Board merely reclassified him I-A by vote of 4-0 without any statement of reasons.

On July 31, 1968, Petitioner was ordered to report for induction. However, on September 16, 1968, the National Director of Selective Service took an appeal, on petitioner's request, to the Presidential Appeal Board, thus effectively cancelling petitioner's induction order. 32 C.F.R. §1627.8.

On November 26, 1961, the Presidential Appeal Board, without a statement of reasons, upheld the action of the State Appeal Board and retained petitioner in class I-A.

On February 10, 1969, petitioner filed suit in the District Court, seeking a judgment declaring the Selective Service appellate regulatory scheme unconstitutional as violative of due process and sought an order enjoining respondents from ordering petitioner's induction and restoring his I-O status.

Respondents moved to dismiss the complaint on April 8, 1969, on the grounds, *inter alia*, that the District Court had no jurisdiction pursuant to Section 10(b)(3) of the Selective Service Act of 1967, 50 U.S.C. App. §460(b)(3). Following briefing and oral argument, the District Court denied petitioner's application on the grounds that Section 10(b)(3) was a bar to the assumption of jurisdiction.

On July 23, 1970, the United States Court of Appeals for the Second Circuit affirmed. 430 F.2d 376. The majority sustained the District Court's finding of the applicability of Section 10(b)(3) as a bar to pre-induction review. Judge Hays concurred, finding in addition that petitioner's failure to establish the jurisdictional amount under 28 U.S.C. §1331(a) deprived the court of subject matter jurisdiction. 430 F.2d at 380.

Chief Judge Lumbard, in dissent, found that the exception to §10(b)(3) carved out by this Court in *Oestereich* v. *Selective Service Local Board No. 11* and *Breen* v. *Selective Service* was applicable and that the jurisdictional amount was satisfied by petitioner's allegations and further that the actions of the State Director and the Appeal Board and the Selective Service System's appellate regulatory scheme failed to meet minimum standards of fairness. 430 F.2d 380-388. Judge Lumbard further noted the possibility that the Appeal Board had utilized information outside of the record in petitioner's Selective Service file and might have indulged in an unwarranted political inference that petitioner's activities as a doctor in a clinic sponsored by the Students for a Democratic Society disqualified him from status as a conscientious objector. 430 F.2d at 386-387, fn. 10.

ARGUMENT

I.

Since the statute in question should be construed to afford petitioner those procedural rights which he sought to assert, respondents' failure to comply with his requests was a violation of the statute and thus constituted the kind of "lawless" action this Court has held attackable by pre-induction judicial review.

As this Court has repeatedly reminded litigants, "it is a cardinal principle" to construe statutes in such a way as to avoid striking them down due to constitutional infirmities. *Crowell* v. *Benson,* 285 U.S. 22, 62 (1932); *United States* v. *Seeger,* 380 U.S. 163 (1965); *Welsh* v. *United States,* 398 U.S. 333 (1970); *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 341 (1936) (Brandeis, *J.,* concurring). Thus, if it can be shown that respondents were under a statutory or regulatory obligation to supply petitioner with the requested information, we need not reach the question of whether §10(b)(3) bars pre-induction review of the constitutional arguments presented by this case, since under the majority opinion in *Oestereich* v. *Selective Service,* 393 U.S. 233 (1968), blatant disregard of a statutory mandate is clearly attackable by a pre-induction suit. E.g. see *Carey* v. *Local Board,* 412 F.2d 71 (2nd Cir. 1969).

Sec. 10(b)(3) of the Military Selective Service Act of 1967, is the statutory warrant for the establishment of appeal boards (as well as the statutory provision which circumscribes judicial review):

> The President is authorized to create and establish within the Selective Service System civilian local

> boards, civilian appeal boards, and such other civilian agencies, including agencies of appeal, as may be necessary to carry out its functions with respect to the . . . classification . . . of persons registered under this title . . . local boards, or separate panels thereof . . . shall, under such rules and regulations prescribed by the President, have the power within the respective jurisdictions of such local boards to hear and determine subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this title of all individuals . . . The decisions of such local board shall be final, except where an appeal is authorized *and is taken in accordance with such rules and regulations as the President may prescribe* . . . The decision of such appeal boards shall be final in cases before them on appeal unless modified or changed by the President . . . the determination of the President shall be final. (Emphasis added.)

Thus, it is clear that local and appeal boards "are creatures of the Selective Service Act."[2] The perimeters of their jurisdiction are confined and their operating procedures defined by "such rules and regulations as the President may proscribe." §10(b)(3). See 32 C.F.R. §§1624, 1625, 1626 and 1627. It follows that activities engaged in, or procedures followed by appeal boards which exceed their statutory warrant or which are in conflict with or are at variance with the statute or the regulations promulgated for their operation by the President, are legal nullities

[2] *Hunt* v. *Local Board*, 438 F.2d 1128, 1131 (3rd Cir. 1971) (en banc) (Gibbons, *J.*, concurring).

and without legal basis, and therefore "basically lawless." As the District of Columbia Court of Appeals has stated in *Swift* v. *Selective Service,* 3 SSLR 3839 (D.C. Cir. 1971) ". . . courts have pre-induction jurisdiction over a claim that a local board acted in plain contravention of the governing law . . ." 3 SSLR at 3843.[3] This rationale has been applied in a number of cases. See *Hunt* v. *Local Board, supra* (J.J. Gibbons and Hastie, concurring). *Walsh* v. *Selective Service,* 305 F. Supp. 1274 (S.D.N.Y. 1969); *Murray* v. *Blatchford,* 307 F. Supp. 1038 (D.R.I. 1969); *Murray* v. *Vaughn,* 300 F. Supp. 688 (D.R.I. 1969) (deprivation of entitlement to occupational deferment involving First and Fifth Amendment violations held attackable on pre-induction review); *Wiener* v. *Selective Service,* 302 F. Supp. 266 (D.Del. 1969) (denial of interview with government appeal agent and right to state director's reasons for adverse appeal); *Itzcovitz* v. *Selective Service,* 301 F. Supp. 168 (S.D.N.Y. 1969) (right to treaty exemption); *Vasquez* v. *Attorney General,* 433 F.2d 516 (D.C. Cir. 1970); *Brinton* v. *Local Board,* 322 F. Supp. 972 (D. Del. 1971) (pre-induction attack on assignment of lottery number); *Falcon* v. *Selective Service,* 434 F.2d 859 (3rd Cir. 1970) aff'g 319 F. Supp. 1355 (W.D.Penn. 1970) (pre-induction attack on allegedly statutorily invalid induction order); *Wright* v. *Local Board,* 319 F. Supp. 509 (D.Minn. 1970) (denial of statutorily mandated fatherhood deferment); *Slettehaugh* v. *Tarr,* 322 F. Supp. 180 (D.Minn. 1971) (failure of appeal board to consider deferment application); *Whitmore* v. *Tarr,* 318 F. Supp. 1279 (D.Neb.

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[3] Within this context, ". . . whether law involves statute . . . or regulation is as irrelevant as whether it involves an 'exemption' or a 'deferment' ". *Shea* v. *Mitchell,* 421 F.2d 1162, 1165-1166 (D.C. Cir. 1970); *Breen* v. *Selective Service,* 396 U.S. 460 (1970).

1970); *Germonprez* v. *Selective Service*, 318 F. Supp. 829 (D.D.C. 1970).

Judge Freedman of the Third Circuit, concurring in *Hunt, supra*, phrased the nature of "lawless" conduct which gives rise to a pre-induction attack this way:

> The characterization in Oestereich of the conduct of a board which justifies pre-induction judicial intervention as "blatantly lawless" [cite omitted] is intended as a description of a clear cut error of law. It does not require an intentional defiance of the law. 438 F.2d at 1138.

These cases may therefore be characterized as representative of those classes of cases which hold that pre-induction review is always available when the Selective Service System acts beyond or contrary to the statute which gives it life and/or the regulations which make it function.[4]

The question then becomes one of statutory analysis. If the Military Selective Service Act of 1967 required petitioner to be afforded those due process rights which he requested, the appeal board's failure to supply them, permits pre-induction review. *Hunt* v. *Local Board, supra; Murray* v. *Blatchford, supra; Wiener* v. *Local Board, supra;*

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[4] See generally, Winick, *Direct Judicial Review of the Actions of the Selective Service System*, 69 Mich. L. Rev. 55 (1970); Donahue, *The Supreme Court vs. Section 10(b)(3) of the Selective Service Act: A Study in Ducking Constitutional Issues*, 17 U.C.L.A. L. Rev. 908 (1970). See also Sec. II, *infra*, for a discussion of the multitude of additional cases discussing the applicability of 10(b)(3) where a purely legal or constitutional question other than a statutory or regulatory violation is alleged. Cf. *Oestereich, supra*, 393 U.S. at 239 (Harlan, J., concurring).

Edwards v. *Local Board,* 313 F. Supp. 177 (D. Colo.), aff'd, 408 F.2d 944 (10th Cir. 1969);[5] *Slettehaugh* v. *Tarr, supra.*

B. The Statute's Requirement.

Every judicial circuit in the United States save one has held that local boards and appeal boards are required to state the reasons for rejecting a registrant's prima facie claim for deferment.[6] While the circuit courts of appeal have differed somewhat in their basis for the formulation of this rule, at least two circuits and several district courts have held that such a requirement is mandated by the statute and regulations.

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[5] There are a large number of cases holding that the question of pre-induction judicial review "is inextricably intertwined with the merits of the controversy." *Zerillo* v. *Local Board,* 3 SSLR 3861 (8th Cir. 1971). See also *Lane* v. *Local Board,* 3 SSLR 3759 (1st Cir. 1971); *Bowen* v. *Hershey,* 410 F.2d 962 (1st Cir. 1969); *Ferrel* v. *Selective Service,* 434 F.2d 686, 687 (2nd Cir. 1970) ("the issues have a tendency to merge"); *Carey* v. *Local Board,* 412 F.2d 71 (2nd Cir. 1969); *Hunt, supra* (J. Aldisert, dissenting); *Nestor* v. *Hershey,* 425 F.2d 504, 511 (D.C. Cir. 1969); *Swift* v. *Director of Selective Service,* 3 SSLR 3839 (D.C. Cir. 1971); *Edwards* v. *Selective Service System,* 432 F.2d 287, 293 (5th Cir. 1970); *Gregory* v. *Tarr,* 436 F.2d 513 (6th Cir. 1971) cert. pending No. 1129, Oct. Term 1970; *Foley* v. *Hershey,* 409 F.2d 827 (7th Cir. 1969); *Liese* v. *Local Board,* 3 SSLR 3860 (8th Cir. 1971); *Evans* v. *Local Board,* 425 F.2d 323 (10th Cir. 1970). Only the Ninth Circuit appears to have steadfastly refrained from any examination of the merits in pre-induction suits. See *Peterson* v. *Clark,* 411 F.2d 1217 (9th Cir. 1969), cert. den. 399 U.S. 928, reh. den. 400 U.S. 855 (1970); *Bookout* v. *Thomas,* 430 F.2d 1343 (9th Cir. 1970). These cases, excepting the Ninth Circuits appear to strongly support the thesis put forth by Justice Harlan in his concurrence in *Oestereich.* Compare, *Hunt, supra* and the later opinion of the Third Circuit in *Morgan* v. *Melcher,* —— F.2d ——, No. 18,697 (3rd Cir., May 5, 1971). See also *Rheingans* v. *Mitchell,* 438 F.2d 345 (9th Cir. 1970).

[6] See Section II, pp. 15-16, *infra.*

32 C.F.R. §1626.12 permits a registrant to file a rebuttal statement addressed to the appeal board directing the board's attention to any information in the file " . . . which he believes the local board has failed to consider or give sufficient weight". If, as here, the file is barren of any reason other than a conclusory statement such as that contained in the State Director's letter to Fein (see p. 6, fn. 2, Petitioner's Brief), devoid of any stated factual basis for the local board's negative decision,[7] it is virtually impossible for a registrant to take meaningful advantage of the provisions of 32 C.F.R. §1626.12.

In *Gonzales* v. *United States*, 348 U.S. 407, this Court recognized that the failure of the Selective Service System to supply a registrant with a copy of the Department of Justice's recommendation to his appeal board regarding his claim for a conscientious objector deferment, unconstitutionally deprived him of an opportunity to rebut any adverse evidence contained therein. The Court, relying on its two prior decisions in *Simmons* v. *United States*, 348

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[7] This case is clearly distinguishable from the Second Circuit's prior decision in *United States* v. *Morico*, 415 F.2d 138 (2nd Cir. 1969) vacated on other grounds, 399 U.S. 526 (1970), where the Court found that:

> "There was sufficient evidence in the file for appellant to determine the basis for the denial of his claim for conscientious objector status both on the local board level and on the appeal board level . . . in effect appellant had at his disposal the reasons and bases for the denial of his claim." 415 F.2d at 143.

The Court of Appeals further found that he in fact did write a response to the Department of Justice recommendation which was considered by the Appeal Board. Cf. *Simmons, supra* at 405:

> "The remarks of the hearing officer at most amounted to vague hints . . . Congress in providing for a hearing did not intend for it to be conducted on the level of a game of blindman's buff. The summary was inadequate and the hearing . . . was therefore lacking in basic fairness."

U.S. 397 (1955) and *United States* v. *Nugent*, 346 U.S. 1 (1953), held that,

> The right to file a statement . . . includes the right to file a meaningful statement . . . with awareness of the . . . arguments to be countered. 348 U.S. at 415.

Prior to the amendment of the Act in 1967, the Department of Justice investigation and compilation of an impartial dossier provided "a special protection for conscientious objectors." *Blalock* v. *United States*, 247 F.2d 615, 619 (4th Cir. 1957). In 1967 however, the Act was amended to eliminate this procedure to reduce delays in the processing of conscientious objector claims. H.R. Rep. No. 267, 90th Cong., 1st Sess. (1967); 1 U.S. Code Cong. and Admin. N.S. 1348 (1967). However, as Judge Weinstein has pointed out in *United States* v. *St. Clair*, 293 F. Supp. 337, 342 (E.D.N.Y. 1968):

> There was no intention to eliminate protections for those claiming conscientious objector status.

Judge Weinstein then went on to declare:

> No advocate can persuasively assert grounds for reversal when the bases for the decision below are unknown. The right of appeal from an administrative decision, *guaranteed by the regulations*, [1626.12] was in effect denied. *Id.* at 345 (emphasis added).

Accord, *U. S.* v. *Lamberd*, 315 F. Supp. 1362 (W.D. Mo. 1970). Cf. *United States* v. *Jagla*, 3 SSLR 3541, 3542 (N.D. Cal. 1970).

Following Judge Weinstein's lead in *St. Clair*, both the Third and Fourth Circuits have recognized that both the

statute and regulations, despite the elimination of the Department of Justice hearing procedures, continue to require a board to inform a registrant of the reasons for its denial of his *prima facie* claim.[8]

In *United States* v. *Broyles*, 423 F.2d 1299, 1306 (4th Cir. 1970), the Court rejected the government's contention that the Act no longer requires statements of reasons to the registrant:

> It is argued that in revising 50 U.S.C.A. App. §456(j) Congress gave full consideration to the reported recommendations of the President's National Advisory Commission on Selective Service, chaired by Mr. Burke Marshall, and published March 6, 1967. 1 U.S. Code Congressional and Administrative News, 90th Cong., First Sess. (1967) pp. 1308, 1309, 1348. It is said that this report suggested that in conscientious objector cases local boards be required to disclose the basis for a decision adverse to the registrant. This suggestion was not enacted into law, but we are referred to no legislative proceedings explaining the rejection. The argument concludes that Congress intended that a local board not be required to articulate its basis of decision.
>
> Absent a complete explanation of why the Marshall suggestion was not adopted, inaction is weak evidence of legislative intent. With equal persuasiveness, it

[8] We agree with the decision of the First Circuit in *United States* v. *Findley*, 3 SSLR 3836 (1971) that to be entitled to a statement of reasons one must at least make out a prima facie case. Or, as Judge Aldrich has phrased it, ". . . if the defendant did not even have openers we clearly wonder how or why he could get into the play. See Mulloy v. United States, 398 U.S. 410, 416." *Findley, supra* at n. 1.

may be argued conversely that Congress did not adopt the suggestion because it was deemed superfluous. Section 10 of the Act, 50 U.S.C.A. App. §460, grants to local boards the power "to hear and determine" all claims of exemption; it permits the establishment of administrative appeals; and it authorizes judicial review to determine if there is "no basis in fact" for the classification assigned a registrant. Implicit in the concept of a "hearing" granted by the statute, and the right, albeit limited, of judicial review is the opportunity to know the issues so that these procedures are not empty gestures. Indeed, once judicial review is granted, basic fair play requires that the parties and the reviewing court have disclosed to them that which is to be reviewed. United States v. Nugent, supra; Gonzales v. United States, supra; United States v. Owen, 415 F.2d 383 (8th Cir. 1969); Brewer v. United States, 211 F.2d 864 (4 Cir. 1954). We are unpersuaded by the argument of negative legislative intent and conclude *that the Act requires* the result we have reached. (Emphasis added.)

Accord, *United States* v. *Speicher*, 3 SSLR 3850, 3851 (3rd Cir. 1971). See also *O'Brien* v. *Resor*, 423 F.2d 592, 598-599 (4th Cir. 1970). Compare *United States* v. *Deans*, 436 F.2d 596 (3rd Cir. 1971).

Thus, since Sec. 10(b)(3) and 32 C.F.R. §1626.12 are properly construed as continuing to require protections equivalent to those provided prior to 1967, it follows that the failure to afford these protections to Fein was a patent violation of the statute making this case clearly subject to

pre-induction review under *Oesterech*. This analysis makes it unnecessary to reach the question whether §10 (b)(3) bars pre-induction review of purely constitutional or legal questions which are beyond the power of the Selective Service System to resolve.

II.

The refusal of the State Director to divulge the reasons for his appeal of petitioner's I-O classification and the absolute refusal of the State Appeal Board to state its reasons for denying him classification as a conscientious objector deprived petitioner of due process, and such actions by the Selective Service System were subject to pre-induction review.

It is now a well settled principle of selective service law that boards must state the reasons for refusing to grant a registrant classification as a conscientious objector once he has made out a *prima facie* claim. Indeed, each of the eleven circuits have spoken on the issue though they have differed somewhat in their formulation of the reasons for such a requirement. The need for articulation of reasons is threefold.

First, registrants must be afforded, as a statutory requirement or as a matter of due process, the basic opportunity to know the grounds upon which his claim is denied. *United States* v. *Speicher*, 3 SSLR 3850 (3rd Cir. 1971); *United States* v. *Broyles*, 423 F.2d 1299 (4th Cir. 1970) (*en banc*); *United States* v. *Washington*, 392 F.2d 37, 39 (6th Cir. 1968); *DeRemer* v. *United States*, 340 F.2d 712, 718 (8th Cir. 1965). See also *United States* v. *St. Clair*, 293 F. Supp. 337 (E.D.N.Y. 1968); *United States ex rel.*

Morton v. *McBee*, 310 F. Supp. 328, 332 (N.D. Ill. 1970); *United States* v. *Lamberd*, 315 F. Supp. 1362 (D. Mo. 1970); *United States* v. *Jagla*, 3 SSLR 3541, 3543 (N.D. Cal. 1970). See generally *Gonzales* v. *United States*, 348 U.S. 407, 415 (1955).

Second, it is virtually impossible for an appeal board to pass intelligently upon the decision of a local board when it cannot be sure of the basis for the lower board's action. *Speicher, supra.* Cf. *United States* v. *Crownfield*, 3 SSLR 3833 (3rd Cir. 1971).

Third, as the majority of Circuits have held, it is impossible for a court to engage in meaningful judicial review if no reasons are stated by the board. *United States* v. *Lenhard*, 437 F.2d 936 (2nd Cir. 1970); *Scott* v. *Commanding Officer*, 431 F.2d 1132, 1137 (3rd Cir. 1970); *Broyles, supra*; cf. *Kessler* v. *United States*, 406 F.2d 151, 156 (5th Cir. 1969); *Washington, supra*; *United States* v. *Lemmens*, 430 F.2d 619 (7th Cir. 1970); *Caverly* v. *United States*, 429 F.2d 92 (8th Cir. 1970); *United States* v. *Haughton*, 413 F.2d 736 (9th Cir. 1969); cf. *United States* v. *Pacheo*, 433 F.2d 914 (10th Cir. 1970). See also *United States* v. *Cassarino*, 314 F. Supp. 813 (D.N.H. 1970); *United States* v. *Prince*, 310 F. Supp. 1161 (D. Me. 1970); and see also *United States* v. *Atherton*, 430 F.2d 741 (9th Cir. 1970). Compare *United States* v. *Curry*, 410 F.2d 1297 (1st Cir. 1969); *Gruca* v. *Sec. of the Army*, 436 F.2d 239, 245 (D.C. Cir. 1970).

Having discussed the statutory requirement in Point I, *supra*, we turn to an examination of the due process issue both as it relates to the registrant and the reviewing courts. That is, whether the failure of the State Director and the State Appeal Board to supply petitioner with reasons and

a statement of the standards to be used by the board in reviewing his case after the state director's appeal, coupled with the National Appeal Board's failure to state its reasons for affirming the State Board's equally silent decision, was a deprivation of due process subject to pre-induction review.

A. The Nature of the Liability Imposed on Both Petitioner and a Reviewing Court.

In *Gonzales* v. *United States,* 348 U.S. 407 (1955) this Court stated that:

> Just as the right to a hearing means the right to a meaningful hearing, *United States* v. *Nugent,* supra; *Simmons* v. *United States,* supra, so the right to file a statement before the Appeal Board includes the right to file a meaningful statement, one based on all the facts in the file and made with awareness of the recommendations and arguments to be countered. 348 U.S. at 415.

In *United States* v. *Speicher,* 3 SSLR 3850, the Third Circuit stated:

> [k]nowledge of the basis for the Local Board's action is as essential today for the filing of a meaningful statement with the Appeal Board as knowledge of the Justice Department's recommendation was before the 1967 amendments. Recently the unanimous Court said:
>
> "Because of the narrowly limited scope of judicial review available to a registrant, the opportunity for full administrative review is indispensable to the fair operation of the Selective Service System." *Mulloy*

v. *United States*, 398 U.S. 410, 416 (1970). 3 SSLR at 3851. See also *United States* v. *Lamberd*, *supra* at 1372, 1374.

Additionally, unless a Local Board gives reasons for its decision, it will not be possible for the Appeal Board intelligently to review the Local Board's decision. Again the Court in *Speicher* recognized that:

> Full administrative review in 1955 included the opportunity to respond to written recommendations.' Gonzales v. United States, supra. In 1970 it can mean no less than that the Appeal Board be informed of the basis for the Local Board's action . . . The Appeal Boards are no more entitled to speculate as to the basis for Local Board action than are reviewing courts. *Ibid.*

Furthermore, in order for there to be judicial review, a court must be able to ascertain the reasons upon which an Appeal Board has denied a prima facie claim for deferment. See *Scott* v. *Commanding Officer*, 431 F.2d 1132 (3rd Cir. 1970) and *United States* v. *Crownfield*, 3 SSLR at 3854, n. 2.

In *Crownfield, supra*, the Third Circuit held:

> The purpose of our holding in *Scott*, supra [that the rejection of a registrant's prima facie case for conscientious objector status without any statement of reasons vitiates the legality of his induction order. Id. 3833], as stated in that opinion, is to ensure meaningful judicial review of administrative action by requiring that the court have some idea of the basis for the

> decision of a local or appeal board . . . the requirements of Scott go to the very essence of judicial review. 3 SSLR 3834-5.

In *United States* v. *St. Clair*, 293 F. Supp. 337 (E.D.N.Y. 1968), Judge Weinstein found that a file devoid of any indication for the board's decision, would deprive a registrant of due process:

> In permitting an appeal from the decisions of a local board, the regulations governing the selective service system provide that the registrant may specify claimed errors. 32 C.F.R. §1626.12. The opportunity to rebut allegedly incorrect conclusions . . . is essential to a meaningful appeal. See United States v. Purvis, 403 F.2d 555 [at 562] (2nd Cir. 1968). *Where no facts or inferences upon which the local board's conclusion is based are stated effective rebuttal is impossible.*[9] No advocate can persuasively assert grounds for reversal when the bases for the decision below are unknown. The right of appeal from an administrative decision, guaranteed by the regulations was in effect denied. [Emphasis added.] 293 F. Supp. at 345.

In *United States ex rel. Morton* v. *McBee*, 310 F. Supp. 328, 332 (N.D. Ill. 1970) the Court stated:

> The constitutional requirement of some specificity in a selective service record is clear. A registrant is at least entitled to be told in what way his case is defec-

[9] Cf. *Hunt* v. *Local Board*, 438 F.2d 1128, 1131 (3rd Cir. 1971) (*en banc*): "Plaintiff complains that the Local Board . . . denied [him] the procedural opportunity to [even] carry the burden of establishing his entitlement to a deferment." (Gibbons, J., concurring).

> tive so that he has a reasonable opportunity to obtain evidence to support it. The local board should endeavor to point out exactly what items influenced its opinion thereby providing the registrant-appellant a fair opportunity to attack those conclusions. It is argued by the government, as it has been in other selective service cases, that Congress did not require the local boards to be judicial tribunals and make specific findings. The point is made that local boards are lay organizations, consisting of untrained and unpaid members who are not equipped to make complete factual determinations of the evidence. But the mere fact that a decision making body is unpaid and untrained does not empower it to make blind judgments. It is inconsistent not only with the historic development of our legal system, but with constitutional principles of due process and fairness. It is true that Congress did not specifically require factual findings to be made by the local board but board decisions are reviewable, and absent some indication of the underlying basis for the local board's conclusion, intelligent review is impossible. This does not necessarily mean detailed findings of fact and conclusions of law such as a court would enter, but some specific suggestion of the local board's determination of the reasons for the board's action other than a general conclusion that the registrant failed to meet the requirements for a I-O classification.

Accord, *United States* v. *Washington,* 392 F.2d 37, 39 (6th Cir. 1968) ("... the board should supply the statements it disbelieves. This will allow the registrant to prepare an effective appeal."); and in *DeRemer* v. *United States,* 340 F.2d 712, 718 (8th Cir. 1965) the Eighth Circuit indicated

that a board should act fairly, ". . . endeavoring in good faith to point out exactly what items influenced its opinion and thus to give appellant a fair chance to attack these conclusions."

In *Scott* v. *Commanding Officer, supra,* and *Crownfield, supra,* the Third Circuit, relying on *United States* v. *Broyles, supra,* joined virtually every other circuit in holding that boards must state their basis for a negative decision and why that negative decision was reached in order to permit effective judicial review.

In *Scott,* the Court relied upon the following language in *Broyles, supra,* which is indicative of the stringent requirements in each of the circuits mentioned at pp. 15-16, *supra*:

> In any case where the board fails to disclose the basis for its decision we risk blind endorsement of a mistake of law. Where it is clear that a prima facie case was established, we conclude that in conscientious objector cases, it is essential to the validity of an order to report that the board state its basis of decision *and the reasons therefor,* i.e., whether it has found the registrant incredible, or insincere, or of bad faith, *and why.* 431 F.2d at 1137.

The Second Circuit, in *Lenhard, supra,* has adopted the test that a Court, upon reviewing a decision of the Selective Service System, must be provided with,

> . . . a record from which a Court can determine [1] whether there was a basis in fact for decision, [2] what that basis was and [3] whether the board applied the correct legal standard. 437 F.2d at 937.

Judge Zampano, the trial judge in *United States* v. *Morico*, 415 F.2d 138 (2nd Cir. 1970), stated:

> I think it would be appropriate, let me say, and helpful to everyone concerned if in this limited area where we have very delicate rights in balance that the Court . . . not just be given the entire record and in effect [told] you go through it to see what we [the local or appeal board[10]] were thinking and justify our position if you can. 416 F.2d at 143.

The requirement of specificity set forth above is unassailable. The only question remaining is whether a violation of the requirement is a due process claim subject to pre-induction review.

B. Sec. 10(b)(3) and the Fifth Amendment Violation in Petitioner's Case.

Judge Lumbard, in dissent below, 430 F.2d 380-388, found that petitioner's pre-induction claim that the Selective Service appeal procedures violated due process,[11] was unaffected by §10(b)(3). He also concluded that his analysis was clearly consistent with this Court's decisions in *Oestereich* v. *Selective Service*, 393 U.S. 233 (1968), and *Breen* v.

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[10] In *Crownfield, supra*, the court noted that:

> Where a local board has in fact reopened and the registrant has proceeded to exhaust his administrative remedies, however, it is the decision of the *appeal board* which must be supported by a statement of reasons. 3 SSLR at 3834, n. 2.

Accord *St. Clair, supra* at 341.

[11] We assume that the court in dealing with this instant issue has rejected our argument that the procedure followed by the Selective Service System in this case involved "a clear departure by the Board from its statutory mandate," *Oestereich, supra*, at 238. See Point I, *supra*.

Selective Service, 396 U.S. 460 (1970), and was supported by decisions of other district and circuit courts.[12]

In dissent, Judge Lumbard succinctly analyzed the applicability of *Oestereich* and *Breen*:

> In Oestereich, Breen and this case, the registrant challenges a procedure unauthorized by statute, while claiming that the regulation deprives him of a right based on higher authority. * * * Here, the regulation establishing appellate procedures arguably conflicts with the due process clause of the Constitution, surely an a fortiori case for preinduction review. In neither Oestereich, Breen, nor this case are there any discretionary determinations of the system involved nor are there any factual inquiries required. See Bucher v. Selective Service System, 421 F.2d 24, 27 (3 Cir. 1970) ("The Section bars pre-induction judicial review only where there is a challenge to the System's resolution of factual questions in the classification or processing of a draft registrant"). In all these cases, the System acted in reliance on a purportedly valid regulation, in such a way as to deny the registrant a firmly established right. Since I would find that the

[12] This case is clearly distinguishable from *Clark* v. *Gabriel*, 393 U.S. 256 (1968) and *Boyd* v. *Clark*, 287 F. Supp. 561 (S.D.N.Y. 1968), aff'd per curiam 393 U.S. 316 (1969). The former, a pre-induction attack on the denial of Gabriel's conscientious objector claim by his local board, was a clear attempt to litigate the "basis in fact" issue in a pre-induction civil suit—exactly the kind of issue §10(b)(3) was enacted to bar. *Oestereich, supra* 393 U.S. at 241 (Harlan, *J.*, concurring). *Boyd* on the other hand, is more properly analyzed as a "standing" case rather than a holding based on §10(b)(3) for there, unlike this case and *Breen* and *Oestereich*, the plaintiffs had not received induction orders. *Fein, supra* at 383 (Lumbard, *C.J.*, dissenting). See, Donahue, *The Supreme Court v. Section 10(b)(3), supra* at 914-915, 940-941.

Oestereich exception reaches Fein's case, I would hold it not barred by Section 10(b)(3).

If the Oestereich exception is to be read narrowly, [citing Justice Harlan's concurrence in *Breen* at 396 U.S. 468], I would recognize a third exception into the section. This exception would permit preinduction review of claims, such as Fein's, that "the very statutes or regulations which the Board administer are facially invalid." Oestereich v. Selective Service System, 393 U.S. 240, 89 S. Ct. at 418, 21 L. Ed.2d 402 (Harlan, J., concurring). In Oestereich the Court showed itself willing creatively to construe Section 10(b)(3); I think that the facts of this case require another exercise of construction here.

I do not believe that Congress, even if it so intended, could by a provision such as Section 10(b)(3) deprive the federal courts of their power to hear allegations that a governmental agency has denied a citizen procedural due process before the registrant is in custody. See 393 U.S. at 243 n. 6, 89 S. Ct. 414. My reading of the section and of its legislative history convinces me that congress had no such intention : . . So, faced with a difficult inquiry into the section's constitutionality or a saving construction consistent with Congress' intent and the statute's clear wording I would recognize another exception to the section to permit claims that an authorizing statute or board regulation is invalid because it is contrary to the constitution. 430 F.2d 382-383.

In *Hunt* v. *Local Board,* 438 F.2d 1128, 1135 (3rd Cir. 1971) (*en banc*), Judge Gibbons, in concurrence, held that §10(b)(3) did not bar a pre-induction attack upon a violation of this Court's decision in *Mulloy* v. *United States,*

398 U.S. 410 (1970), because while "Administrative appellate review may be a sufficient due process substitute for pre-induction judicial review . . . discretionary elimination by the original administrative agency of any administrative review, coupled with postponement of judicial review until a criminal trial or . . . post-induction habeas corpus" may be unconstitutional. *Id.* It is to be recognized that Fein's claim of deprivation of the right to a meaningful appeal is virtually indistinguishable from Hunt's allegation of the failure to grant him any appeal at all. *Gonzales, supra* at 415. See also fn. 9, p. 19, *supra; Barker* v. *Hershey,* 309 F. Supp. 277 (D. Wisc. 1969).

Fein's case, save the difference in the particular classification involved, is similar to *Wiener* v. *Local Board,* 302 F. Supp. 266 (D. Del. 1969). There, Judge Steel held that where on an appeal by the state director of Selective Service from a local board's assignment of a II-A classification (occupational deferment) to a registrant, the failure of the clerk of the board to afford the plaintiff an interview with a government appeal agent coupled with the state director's refusal to state the reasons for his appeal deprived the registrant of due process as contemplated by this Court in *Gonzales.* See also the exhaustive opinions of Judge Pettine in *Murray* v. *Vaughn,* 300 F. Supp. 688 (D. R.I. 1969) and *Murray* v. *Blatchford,* 307 F. Supp. 1038 (D. R.I. 1969). See also *Edwards* v. *Local Board,* 313 F. Supp. 650 (E.D. Pa. 1970). In all of these cases it was recognized that the actions of the Selective Service System were inconsistent with the most basic notions of due process and further that they were not violations susceptible to "cure" save by judicial intervention. Seen in this light, the actions of these courts comport with Congress' overall

intention to insure the smooth functioning of the Act. Cf. *Oestereich, supra* (Harlan, J. concurring).

III.

Petitioner's claims are not barred by the ten thousand dollar requirement of 28 U.S.C. §1331.

A. Petitioner's Induction Would Deprive Him of $10,000 in Personal Income.

The Federal Courts have been inconsistent in their treatment of the standard of valuation to be used in cases seeking vindication of constitutional rights. Some courts have adopted a strict interpretation of the statute's language[13] as did Judge Hays below. 430 F.2d at 380. The analysis of other courts have been more liberal.[14] The Second Circuit and the district courts within its jurisdiction have been, at the least, inconsistent in their treatment of the issue in cases involving constitutional rights. Compare *Boyd* v. *Clark*, 287 F. Supp. 561 (S.D.N.Y. 1968), and Judge Hays' concurring opinion here, with the cases cited in fn. 14, *infra*. One thing, however, remains clear within this morass.[15] As Judge Weinstein observed in *Cortright* v. *Resor*, 3 SSLR 3804:

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[13] E.g., *Goldsmith* v. *Sutherland*, 426 F.2d 1395 (6th Cir. 1970), cert. denied 39 U.S.L.W. 3526 (Dec. 24, 1970); *Yoder* v. *Tribes of Fort Peck Indian Reservation*, 339 F.2d 360 (9th Cir. 1964); *Giancana* v. *Johnson*, 335 F.2d 366 (7th Cir. 1964).

[14] See *Berk* v. *Laird*, 429 F.2d 302, 306 (2nd Cir. 1970); *Phillips* v. *Rockefeller*, 435 F.2d 976, 978, n. 5 (2nd Cir. 1970); *Murray* v. *Vaughn*, 300 F. Supp. 688, 694-96 (D. R.I. 1969); *Cortright* v. *Resor*, 3 SSLR 3799, 3804 (E.D.N.Y. 1971) (Weinstein, *D.J.*); *Walsh* v. *Local Board*, 305 F. Supp. 1274, 1276 (S.D.N.Y. 1969); *Fifth Avenue Peace Parade Committee* v. *Hoover*, —— F. Supp. ——, 70 Civ. 2646 (S.D.N.Y. April 28, 1971).

[15] Resolution of the issue has not been aided by the reluctance of both this and some Circuit Courts to pass on the issue. See e.g.,

> Dismissal for lack of jurisdiction is inappropriate unless it appears to be a legal certainty that less than $10,000 is at issue [citations omitted].

Since it can be arguably maintained that the differential between Fein's civilian and military income would exceed $10,000, Judge Hays' additional ground for dismissal is improper.

B. If Fein Did Not Establish an Arguable Controversy in Excess of $10,000, the Monetary Requirement Is Either Inapplicable or Unnecessary to Cases Such as This, or It Is Facially Unconstitutional.

The jurisdictional amount requirement of Sec. 1331 is inapplicable to suits brought upon claims that federal laws and federal officials have violated personal liberties guaranteed under the Constitution. Any other result would be inconsistent with Congress' purpose in adopting the jurisdictional amount requirement. It was repeatedly asserted in Congress when the juridictional amount was raised to $10,000 in 1958, that "the only significant categories of 'Federal question' cases subject to the jurisdictional amount are suits under the Jones Act and suits contesting the constitutionality of State statutes." 1958 *U. S. Code Cong. and Admin. News* 3103. See also S. REP. No. 1830, 85th Cong., 2d Sess. (1958); 1958 *U. S. Code Cong. and Admin. News* 3099, 3112-13, 3122. Any other result leads to the dangerous and irrational conclusion that, although invasions of constitutionally protected rights by state officials are subject to plenary judicial power (see 28 U.S.C. §1343), federal

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Oestereich v. *Selective Service*, 393 U.S. 233, 239 (1968); *Boyd* v. *Clark*, 393 U.S. 316 (1969); *Tatum* v. *Laird*, —— F.2d ——, No. 24,203 (D.C. Cir. April 27, 1971).

officers in cases like the one at bar, would be immune from judicial sanction in equitable cases for precisely the same illegal conduct. Any other result would render Section 1331 constitutionally suspect. See *Cortright* v. *Resor, supra; Fifth Avenue Peace Parade Committee, supra; Wolff* v. *Selective Service Bd.*, 372 F.2d 817, 826 (2d Cir. 1967) (Senior Judge Medina); *Giancana* v. *Johnson*, 335 F.2d 366, 371 (7th Cir. 1964) (dissenting opinion of Judge Swygert), *cert. denied*, 379 U.S. 1001 (1965); *Boyd* v. *Clark*, 287 F. Supp. 561 (S.D.N.Y. 1968) (dissenting opinion of Judge Edelstein), *aff'd on other grounds*, 393 U.S. 316 (1969); *Murray* v. *Vaughn*, 300 F. Supp. 388 (D. R.I. 1969) (Judge Pettine); Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L. J. 1205, 1306-08 (1970); but see, *Goldsmith* v. *Sutherland*, 426 F.2d 1395, cert. denied, 39 U.S.L.W. 3256 (Dec. 14, 1970).

As previously stated, this Court has not passed directly upon this question. E.g., *Oestereich* v. *Selective Service Bd., supra.* However, this Court and other federal courts have frequently dealt on the merits with cases conceptually similar to the present one without inquiring whether the jurisdictional amount required by Sec. 1331 was satisfied. See, e.g., *Aptheker* v. *Secretary of State*, 378 U.S. 500 (1964) (right to a passport); *Schneider* v. *Rusk*, 377 U.S. 163 (1964) (right to citizenship at issue); *Quaker Action Group* v. *Hickel*, 421 F.2d 1111 (D.C. Cir. 1970) (suit for declaratory judgment against the Department of Interior's regulations restricting picketing in front of the White House); *Thompson* v. *Clifford*, 408 F.2d 154 (D.C. Cir. 1968) (right to burial in Arlington National Cemetery). On some occasions, judges recognize but gloss over the question as, for example, in *Breen* v. *Selective Service*

Bd., 406 F.2d 636, 637 n. 1 (2d Cir, 1969), rev'd on other grounds, 396 U.S. 460 (1970), where the Second Circuit, referring to the jurisdictional amount said "[T]he Government has made no point about this nor shall we."

This Court would also have plenary jurisdiction, over the respondents without regard to the amount in controversy, under 28 U.S.C. §1361, if the argument set forth in Point I of our brief is adopted by the Court. See *Hunt* v. *Local Board,* 438 F.2d 1128, 1138 (3rd Cir. 1971) (*en banc*) (Hastie, J. concurring). This statute gives the District Courts "original jurisdiction of any action in the nature of mandamus to compel an officer employee of the United States or any agency thereof to perform a duty owed to the plaintiff." Section 1361 was enacted by Congress in 1962 "to make it possible to bring actions against government officials and agencies in the U. S. District Courts outside the District of Columbia, which, because of certain existing limitations on jurisdiction and venue, may now be brought only in the U. S. District Court for the District of Columbia." S. REP. No. 1992, 87th Cong., 2d Sess. (1962); 1962 *U. S. Code Cong. and Admin. News,* 2784, 2785, 2788. See also, 3 DAVIS, ADMINISTRATIVE LAW §23.09, at 85 (1965 Supp.); Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus,* 75 HARV. L. REV. 1479 (1962); Jacoby, *The Effect of Recent Changes in the Law of "Nonstatutory" Judicial Review,* 53 GEO. L.J. (1964); Byse and Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action,* 81 HARV. L. REV. 308 (1967).

The instant suit seeks mandatory injunctive relief against unconstitutional or *ultra vires* actions of the re-

spondents. As Byse and Fiocca have observed, even "[b]efore enactment of section 1361, some federal courts had issued mandatory injunctions which granted the same relief as writs of mandamus . . ." 81 HARV. L. REV. at 319, 312-313. Further, Section 1361 "should be interpreted as authorizing mandatory injunctive relief in original actions even though the relief awarded is essentially the same as, or identical to, that which would be granted by a writ of mandamus, thus developing the equity, rather than mandamus tradition." 81 HARV. L. REV. at 320, 355. This suit does not invite the Court to review an exercise of discretion by the defendant members of the Selective Service System. See Points I and II, *supra*. (Petitioner claims that the Respondents acted unconstitutionally or *ultra vires* their authority.) In fact, this suit prays the enforcement of a ministerial duty. See Point I, *supra*. It is, therefore, in the nature of an action for mandamus under 28 U.S.C. §1361, *Hunt, supra* at 438 F.2d 1138-40 (J. Hastie concurring); *Cortright* v. *Resor, supra* at 3 SSLR at 3806; *Rose* v. *McNamara*, 225 F. Supp. 891, 894 (E.D. Pa. 1963), aff'd per curiam, 339 F.2d 259 (4th Cir. 1964); see generally, *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 317-18 (1958); *Wilbur* v. *United States ex rel. Kadrie*, 281 U.S. 206, 218-19 (1930); *Higinson* v. *Schoeneman*, 190 F.2d 32, 34-35 (D.C. Cir. 1951); 3 DAVIS, ADMINISTRATIVE LAW §§23.09-23.12 (1958, Supp. 1965).

Section 1361 is one of that group of statutes recently characterized by Professor Wright as granting "jurisdiction, without regard to the amount in controversy, in virtually all the areas that otherwise would fall under the general federal question statute." WRIGHT, FEDERAL COURTS §32, at 108 (2 ed. 1970). See also, 1 MOORE FEDERAL PRAC-

TICE ¶.90[1] (2 ed. 1964). (As Byse and Fiocca observed, "from the very beginning section 1361 was intended to be jurisdictional . . ." 81 HARV. L. REV. at 351.) Thus, assuming *arguendo* that the amount any of the named plaintiffs has in controversy is less than $10,000, the federal courts still have jurisdiction over the respondent members of the Selective Service System. The courts' jurisdiction over the defendants other than the United States is plenary under section 1361. "[I]t can provide the independent basis of jurisdiction necessary to sustain an action for a declaratory judgment." Byse and Fiocca, 81 Harv. L. Rev. at 351. Moreover, it provides the independent basis of jurisdiction necessary to issue the complete injunctive relief requested by petitioner, for the mandamus and mandatory injunctive remedies tended to merge even before enactment of Section 1361 and surely have merged since. See generally, Byse and Fiocca, *supra*, 81 Harv. L. Rev. 308 *passim*. Since the relief requested and properly available under Section 1361, includes an order in the nature of mandamus, jurisdiction is valid notwithstanding §1331.

CONCLUSION

For the foregoing reasons the decision below should be reversed.

Respectfully submitted,

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